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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 620

R. A. ROGERS, also known as
Roy A. Rogers,
Petitioner,

vs.

NOEL S. ALTON,
Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
in and for the First Appellate District,
Division One Thereof.**

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To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

INTRODUCTION.

The "Statement of the Case" and the facts set out in the "Introduction" of the petition for a writ of

certiorari are not complete nor are they accurate. The District Court of Appeal, State of California, has fully reviewed the case in its opinion (127 Cal. App. 2d 667, 669; 274 Pac. 2d 487) and respondent in his brief filed in said District Court of Appeal set forth a "Statement of Facts Proved" with citations to the record (BR 2-35), which statement was not disputed by petitioner in his reply brief filed in said District Court.

Respondent is informed and believes that the transcript of the record filed by petitioner for a writ of certiorari did not include certified copies of the briefs filed in the District Court of Appeal, State of California, the petition for a hearing by the Supreme Court of the State of California, nor respondent's answer in opposition to said petition. Pursuant to Rule 21 (6) of the Revised Rules of the Supreme Court of the United States, respondent has filed certified copies of said briefs, petition and answer along with this brief.

ARGUMENT.

I. NO FEDERAL QUESTION WAS DECIDED BY THE STATE COURT.

No federal question was raised in the trial court. The grounds relied upon by petitioner in his appeal to the District Court of Appeal, State of California, are set forth on pages 15 and 16 of Appellant's Opening Brief filed in said court. None of these grounds involved a federal question nor was any claim made in said District Court of Appeal that a federal ques-

tion was involved. The opinion of said District Court of Appeal did not decide any federal question either directly or indirectly (127 Cal. App. 2d 667; 274 Pac. 2d 487).

The foregoing facts are not disputed. Petitioner contends that he raised a federal question in his petition for a hearing by the Supreme Court of the State of California and that said Supreme Court necessarily decided a federal question when it denied his petition. Said order of denial was made by the Supreme Court of California without a written opinion.

On pages 4 and 5 of his petition to the Supreme Court of California for a hearing, petitioner set forth the grounds on which he relied, as follows:

"GROUNDS FOR HEARING BY THE SUPREME COURT

"(1) The complaint of respondent does not, nor does either of the counts thereof, state facts sufficient to constitute a cause of action for fraud or to entitle the respondent to any relief against appellant.

"(2) The evidence was insufficient as a matter of law to establish fraud on the part of appellant.

"(3) The evidence produced by the plaintiff, both oral and documentary, shows without conflict that his claim was barred by the statute of limitations.

"(4) The District Court of Appeal has committed error in holding that the allegations of the complaint touching the discovery of the al-

leged fraud were sufficient and in holding that the case involves an oral, voluntary and continuing trust, when the evidence conclusively negatives any theory of a trust.

"(5) The District Court of Appeal has committed error in upholding the action of the trial court in submitting legal issues to the jury without first disposing of the equitable issues.

"(6) The judgment for both compensatory and punitive damages is admittedly void, and is specifically stated to be void by the District Court of Appeal, which has committed error in ordering the void judgment incorporated in a subsequent judgment.

"(7) The District Court of Appeal has committed error in holding against the claim of appellant that the causes of action are inconsistent and that an election was required.

"(8) The District Court of Appeal has erred in ruling against the claim of appellant that the fraud, if any, was waived by the conduct of the respondent.

"(9) Material facts were omitted and incorrectly stated in the opinion of the District Court of Appeal.

"(10) The lower Court committed error in denying the motion of the defendant and appellant for a new trial.

"(11) The District Court of Appeal has committed error in upholding the award of punitive damages.

"(12) The evidence conclusively shows that plaintiff and respondent loaned money to the wit-

ness Devou, that his claim was against Devou alone, that appellant did not hold any funds of respondent in trust, that respondent's sole remedy was by an action on the note, for the payment of which there was no liability whatsoever on the part of appellant."

None of said grounds raised or involved a federal question.

The quotations from said petition to the Supreme Court of the State of California set out on pages 8 and 9 of the petition to this Court are taken from the introduction (p. 3), the conclusion (p. 82-83) and an unnumbered page opposite page one. They are but general conclusions and at no other place in said petition are they mentioned or argued.

Petitioner did not petition the District Court of Appeal, State of California, for a rehearing and Rule 29 (b) of the Rules on Appeal of the State of California was applicable on his petition to the Supreme Court of California for a hearing. Said Rule 29 (b) reads as follows:

"(Examination of record) On petition for hearing the Supreme Court will not examine the record for error, or inquire into the correctness of the facts stated in the opinion unless the petition shows: (1) That material facts were omitted from or incorrectly stated in the opinion of the District Court of Appeal and that the alleged omission or other inaccuracy was set forth in a petition for rehearing and not corrected by the District Court of Appeal; or (2) that substantial legal issues raised in the briefs were not con-

sidered in the opinion, and that the failure to consider them was set forth in a petition for rehearing."

Regarding the alleged federal questions which petitioner contends he raised in his petition to the Supreme Court of the State of California for the first time, the law is settled in California that such a petitioner cannot ask in effect a first hearing of a question which should have been raised in the District Court of Appeal and this is a sufficient reason to deny such a petition. (*Nemo v. Farrington,* 7 Cal. App. 443, 451; 94 P. 874; Opinion of Supreme Court of California denying hearing. *Brown v. Coffee,* 17 Cal. App. 381; 121 P. 309, 311; Opinion of Supreme Court of California denying hearing.)

The mere allegation that a federal right has been violated, first made in a petition in the highest state court for review of the judgment of an intermediate appellate court, is too late to serve as a basis for the exercise of the appellate jurisdiction of the Supreme Court of the United States, where it does not affirmatively appear that the state court passed upon the alleged federal question, and where according to the state law the failure to have raised the alleged federal question at an earlier stage in the state courts is a ground for the denial of such petition for review by the highest state court. (*Chicago I. & L. R. Co. v. McGuire,* 196 U.S. 128, 131; 49 L.Ed. 413, 415; 25 S.Ct. 200.) The Supreme Court of the United States is without power to decide whether constitutional rights have been violated when the federal questions

are not seasonably raised in accordance with the requirements of state law. (*Edelman v. California*, 344 U.S. 357; 97 L.Ed. 387; 73 S.Ct. 293.)

CONCLUSION.

No federal question was raised in or decided by the trial court or the District Court of Appeal, State of California. Petitioner contends that he first raised a federal question in his petition to the Supreme Court of the State of California for a hearing after decision by the District Court of Appeal, State of California. Said petition was denied by the Supreme Court of the State of California without opinion. The law in the State of California holds that new questions cannot be raised for the first time in such a petition to the State Supreme Court. This alone was a sufficient basis for the State Supreme Court to deny a hearing as to the alleged federal questions. Since no federal question was decided by the courts of the State of California, the Supreme Court of the United States has no jurisdiction to grant a writ of certiorari.

Dated, San Francisco, California,
March 14, 1955.

Respectfully submitted,
ROBERT EMMETT HALSING,
Attorney for Respondent.

CHARLES W. ROBERTSON,
EDWARD A. HAMMER,
Of Counsel.